

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JOSHUA S. SOTO,  
Plaintiff,

v.

WARDEN OF SALINAS VALLEY  
STATE PRISON, et al.,  
Defendants.

Case No. 15-02024 BLF (PR)

**ORDER GRANTING DEFENDANTS'  
MOTION FOR SUMMARY  
JUDGMENT**

(Docket Nos. 23 & 28)

Plaintiff, a state prisoner at Salinas Valley State Prison ("SVSP"), filed a *pro se* civil rights complaint under 42 U.S.C. § 1983. The Court found the complaint stated cognizable claims under the Eighth Amendment for excessive force and deliberate indifference to inmate safety, and a conspiracy claim.<sup>1</sup> (ECF No. 7 at 10.) Defendants Bittner, Hernandez, Peffley, and Stevenson filed a motion for summary judgment on the grounds that Plaintiff failed to exhaust administrative remedies. (ECF No. 23.) Defendant Correa filed a separate motion for summary judgment also arguing that Plaintiff failed to

<sup>1</sup> The Court also dismissed with leave to amend a conspiracy claim against Defendants Bittner and the SVSP Warden. (Docket No. 7 at 10-11.) Plaintiff did not file an amended complaint in the time provided. Accordingly, the action proceeded only on the claims found cognizable in the Court's Order of Partial Dismissal as identified above.

1 exhaust administrative remedies, and that there is no evidence that he was involved in a  
2 conspiracy. (ECF No. 28.) Plaintiff filed a single opposition to both motions, (ECF No.  
3 35), and Defendants filed separate replies, (ECF Nos. 38 and 40). For the reasons stated  
4 below, Defendants' motions for summary judgment are GRANTED.

## 5 6 DISCUSSION

### 7 **I. Plaintiff's Claims**

8 Plaintiff claims that on June 26, 2014, Defendants Correctional Officers Peffley and  
9 Bittner ran over to his cell and ordered Plaintiff and his cellmate to get down. (ECF No. 1  
10 at 10.) Plaintiff complied with the officers' orders. (*Id.* at 10, 37-38.) Officer Peffley then  
11 threw a tear gas grenade into Plaintiff's cell via the cell door's food slot. (*Id.* at 3, 10.)  
12 The grenade exploded, causing Plaintiff's clothing to catch on fire and resulting in severe  
13 burns to Plaintiff's legs. (*Id.* at 3, 10-12.) Then Defendants Peffley, Bittner, and  
14 Hernandez, and other unidentified correctional officers, sprayed Plaintiff with propellant  
15 "O.C. Pepper Spray," which caused the flames to accelerate. (*Id.* at 11.)

16 Plaintiff claims that Defendants conspired to hide evidence of the fire that was  
17 caused by the tear gas grenade. (*Id.* at 13.) He claims that Defendant Lt. J. Stevenson  
18 reviewed all reports related to this incident and edited the incident reports to hide the fact  
19 that the use of the grenade set Plaintiff on fire. (*Id.* at 11.) Plaintiff also claims that  
20 Defendant Sgt. Correa failed to include in his incident report that the use of the grenade set  
21 Plaintiff on fire, and that he failed to direct other correctional officers, who are non-parties  
22 to this action, to include this fact in their incident reports. (*Id.* at 11-12.)

23 Based on these allegations, the Court found Plaintiff stated cognizable Eighth  
24 Amendment claims of excessive force for the use of the gas grenade and pepper spray and  
25 for deliberate indifference to inmate safety for the failure to intervene during the use of  
26 excessive force and for authorizing the use of explosive devices. (ECF No. 7 at 5.) The  
27 Court also found cognizable Plaintiff's conspiracy claim based on the allegation that  
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1 Defendants deliberately omitted from their incident reports the fact that Plaintiff had been  
2 set on fire by the use of a grenade. (*Id.* at 8.)

3 **II. Summary Judgment**

4 Summary judgment is proper where the pleadings, discovery and affidavits show  
5 that there is “no genuine dispute as to any material fact and the movant is entitled to  
6 judgment as a matter of law.” Fed. R. Civ. P. 56(a). A court will grant summary judgment  
7 “against a party who fails to make a showing sufficient to establish the existence of an  
8 element essential to that party’s case, and on which that party will bear the burden of proof  
9 at trial . . . since a complete failure of proof concerning an essential element of the  
10 nonmoving party’s case necessarily renders all other facts immaterial.” *Celotex Corp. v.*  
11 *Cattrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it might affect the outcome of  
12 the lawsuit under governing law, and a dispute about such a material fact is genuine “if the  
13 evidence is such that a reasonable jury could return a verdict for the nonmoving party.”  
14 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

15 Generally, the moving party bears the initial burden of identifying those portions of  
16 the record which demonstrate the absence of a genuine issue of material fact. *See Celotex*  
17 *Corp.*, 477 U.S. at 323. Where the moving party will have the burden of proof on an issue  
18 at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other  
19 than for the moving party. But on an issue for which the opposing party will have the  
20 burden of proof at trial, the moving party need only point out “that there is an absence of  
21 evidence to support the nonmoving party’s case.” *Id.* at 325. If the evidence in opposition  
22 to the motion is merely colorable, or is not significantly probative, summary judgment may  
23 be granted. *See Liberty Lobby*, 477 U.S. at 249-50.

24 The burden then shifts to the nonmoving party to “go beyond the pleadings and by  
25 her own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on  
26 file,’ designate specific facts showing that there is a genuine issue for trial.” *Celotex*  
27 *Corp.*, 477 U.S. at 324 (citations omitted). If the nonmoving party fails to make this  
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1 showing, “the moving party is entitled to judgment as a matter of law.” *Id.* at 323.

2 The Court’s function on a summary judgment motion is not to make credibility  
3 determinations or weigh conflicting evidence with respect to a material fact. *See T.W.*  
4 *Elec. Serv., Inc. V. Pacific Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).  
5 The evidence must be viewed in the light most favorable to the nonmoving party, and the  
6 inferences to be drawn from the facts must be viewed in a light most favorable to the  
7 nonmoving party. *See id.* at 631. It is not the task of the district court to scour the record  
8 in search of a genuine issue of triable fact. *Keenan v. Allen*, 91 F.3d 1275, 1279 (9th Cir.  
9 1996). The nonmoving party has the burden of identifying with reasonable particularity  
10 the evidence that precludes summary judgment. *Id.* If the nonmoving party fails to do so,  
11 the district court may properly grant summary judgment in favor of the moving party. *See*  
12 *id.*; *see, e.g., Carmen v. San Francisco Unified School District*, 237 F.3d 1026, 1028-29  
13 (9th Cir. 2001).

14 **A. Exhaustion**

15 The Prison Litigation Reform Act of 1995 (“PLRA”) amended 42 U.S.C. § 1997e to  
16 provide that “[n]o action shall be brought with respect to prison conditions under [42  
17 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or  
18 other correctional facility until such administrative remedies as are available are  
19 exhausted.” 42 U.S.C. § 1997e(a). Exhaustion is mandatory and no longer left to the  
20 discretion of the district court. *Woodford v. Ngo*, 548 U.S. 81, 84 (2006) (citing *Booth v.*  
21 *Churner*, 532 U.S. 731, 739 (2001)). “Prisoners must now exhaust all ‘available’  
22 remedies, not just those that meet federal standards.” *Id.* Even when the relief sought  
23 cannot be granted by the administrative process, i.e., monetary damages, a prisoner must  
24 still exhaust administrative remedies. *Id.* at 85-86 (citing *Booth*, 532 U.S. at 734). The  
25 PLRA’s exhaustion requirement requires “proper exhaustion” of available administrative  
26 remedies. *Id.* at 93.

27 The California Department of Corrections and Rehabilitation (“CDCR”) provides  
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1 its inmates and parolees the right to appeal administratively “any departmental decision,  
2 action, condition, or policy which they can demonstrate as having an adverse effect upon  
3 their welfare.” Cal. Code Regs. tit. 15, § 3084.1(a). It also provides its inmates the right  
4 to file administrative appeals alleging misconduct by correctional officers. *See id.* §  
5 3084.1(e). Under the current regulations, in order to exhaust available administrative  
6 remedies within this system, a prisoner must submit his complaint on CDCR Form 602  
7 (referred to as a “602”) and proceed through three levels of appeal: (1) first formal level  
8 appeal filed with one of the institution’s appeal coordinators, (2) second formal level  
9 appeal filed with the institution head or designee, and (3) third formal level appeal filed  
10 with the CDCR director or designee. *Id.* § 3084.7.

11 The filing of an untimely grievance or appeal is not proper exhaustion. *See*  
12 *Woodford v. Ngo*, 548 U.S. at 83-84. A prisoner must complete the administrative review  
13 process in accordance with the applicable procedural rules, including deadlines, as a  
14 precondition to bringing suit in federal court. *Id.*; *see also Johnson v. Meadows*, 418 F.3d  
15 1152, 1159 (11th Cir. 2005) (holding that, to exhaust remedies, a prisoner must file appeals  
16 in the place, and at the time, the prison’s administrative rules require); *Spruill v. Gillis*, 372  
17 F.3d 218, 230 (3d Cir. 2004) (same); *Ross v. County of Bernalillo*, 365 F.3d 1181, 1185-86  
18 (10th Cir. 2005) (same); *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002)  
19 (same).

20 Nonexhaustion under § 1997e(a) is an affirmative defense. *Jones v. Bock*,  
21 549 U.S. 199, 211 (2007). Defendants have the burden of raising and proving the absence  
22 of exhaustion, and inmates are not required to specifically plead or demonstrate exhaustion  
23 in their complaints. *Jones*, 549 U.S. at 215-17. In the rare event that a failure to exhaust is  
24 clear on the face of the complaint, a defendant may move for dismissal under Rule  
25 12(b)(6) of the Federal Rules of Civil Procedure. *Albino v. Baca*, 747 F.3d 1162, 1166  
26 (9th Cir. 2014) (en banc). Otherwise, defendants must produce evidence proving failure to  
27 exhaust in a motion for summary judgment under Rule 56 of the Federal Rules of Civil  
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1 Procedure. *Id.* If undisputed evidence viewed in the light most favorable to the prisoner  
2 shows a failure to exhaust, a defendant is entitled to summary judgment under Rule 56. *Id.*  
3 at 1166. But if material facts are disputed, summary judgment should be denied and the  
4 district judge rather than a jury should determine the facts in a preliminary proceeding. *Id.*

5 The defendant's burden is to prove that there was an available administrative  
6 remedy and that the prisoner did not exhaust that available administrative remedy. *Id.* at  
7 1172; *see id.* at 1176 (reversing district court's grant of summary judgment to defendants  
8 on issue of exhaustion because defendants did not carry their initial burden of proving their  
9 affirmative defense that there was an available administrative remedy that prisoner  
10 plaintiff failed to exhaust); *see also Brown v. Valoff*, 422 F.3d 926, 936-37 (9th Cir. 2005)  
11 (as there can be no absence of exhaustion unless some relief remains available, movant  
12 claiming lack of exhaustion must demonstrate that pertinent relief remained available,  
13 whether at unexhausted levels or through awaiting results of relief already granted as result  
14 of that process). Once the defendant has carried that burden, the prisoner has the burden of  
15 production. *Albino*, 747 F.3d at 1172. That is, the burden shifts to the prisoner to come  
16 forward with evidence showing that there is something in his particular case that made the  
17 existing and generally available administrative remedies effectively unavailable to him.  
18 *Id.* But as required by *Jones*, the ultimate burden of proof remains with the defendant. *Id.*

19 **B. Motion by Defendants Bittner, Hernandez, Peffley, and Stevenson**

20 Defendants Bittner, Hernandez, Peffley, and Stevenson argue that Plaintiff failed to  
21 exhaust his administrative remedies with respect to the claims against them. (ECF No. 23  
22 at 4-5.) The claims against these Defendants are as follows: Defendants Peffley and  
23 Hernandez used excessive force; Defendant Bittner acted with deliberate indifference to  
24 inmate safety for failing to intervene; and a conspiracy claim against Defendants  
25 Stevenson, Peffley and Hernandez. (ECF No. 7 at 10.) Defendants point to the fact that  
26 Plaintiff relies on inmate appeal Nos. SVSP-14-3437 and SVSP-14-3640, and argue that  
27 these two appeals do not constitute proper exhaustion because they were appropriately  
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1 dismissed or cancelled as untimely. (*Id.*, citing Compl. at 1-2.)

2 **1. Appeal No. SVSP-14-3437**

3 Plaintiff submitted inmate appeal No. SVSP-14-3437 on August 3, 2014. (ECF No.  
4 1 at 31.) In this appeal, Plaintiff complained that on June 26, 2014, “staff (see attache[d]  
5 CDC-115 #FB-14-06-0074) did use an explosive device... causing sever [*sic*] burns to my  
6 lower body.” (*Id.*) The referenced attachment, a copy of the Rules Violation Report  
7 (“RVR”) issued to Plaintiff for “willfully obstructing/delaying/resisting a peace officer in  
8 performance of duties,” identified Defendants Bittner, Heranandez and Peffley as the  
9 involved staff. (*Id.* at 36.) Plaintiff also alleged that the incident stemmed from  
10 uncorroborated and unreliable information, that Acting Warden Muniz was indifferent to  
11 proper investigation techniques, and that less dangerous methods could have been used to  
12 remove him and his cellmate from the cell. (*Id.* at 33.) Plaintiff sought monetary  
13 compensation for pain and suffering, and the issuance of a revised incident report (CDCR-  
14 837) reflecting that there was no justification for the use of force. (*Id.* at 31, 33.) Based  
15 upon these allegations, it could be said that this appeal, liberally construed, includes the  
16 same subject and request for relief with respect to the claims of excessive force and  
17 deliberate indifference to inmate safety in the instant action. *See Griffin v. Arpaio*, 557  
18 F.3d 1117, 1120 (9th Cir. 2009). However, the appeal was cancelled on the basis that time  
19 limits were exceeded. (*Id.* at 41.)

20 Defendants assert that under California Code of Regulations, title 15, section  
21 3084.8(a), an inmate is required to submit an appeal within thirty calendar days of the  
22 occurrence of the event being appealed. (ECF No. 23 at 5.) The underlying incident  
23 occurred on June 26, 2014, and Plaintiff submitted inmate appeal No. SVSP-14-3437  
24 thirty-eight days later, on August 3, 2014. Accordingly, since Plaintiff filed appeal No.  
25 SVSP-14-3437 more than thirty days after the event occurred, his appeal was denied as  
26 untimely. Defendants have met their burden of showing that there was an available  
27 administrative remedy and that Plaintiff did not exhaust that available administrative  
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1 remedy. *Albino*, 747 F.3d at 1172. The burden shifts to Plaintiff to show that there is  
2 something in his particular case that made the existing and generally available  
3 administrative remedies effectively unavailable to him. *Id.*

4 Plaintiff asserts in his complaint and opposition that he had a good-faith belief that  
5 an exception to normal time constraints under § 3084.9(g)(1) applied to his inmate appeal  
6 because he had received an RVR following the incident on June 26, 2014. (ECF No. 1 at  
7 7-8; Opp. at 12-14.) Section 3084.9(g)(1) states that “[a] disciplinary action cannot be  
8 appealed until the hearing process is completed, including any re-hearing.” Cal. Code  
9 Regs. tit. 15, § 3084.9(g)(1) (2014). According to the clear language, this section prohibits  
10 an inmate from grieving a disciplinary action until the whole process is completed, which  
11 implies that an inmate may appeal an RVR once disciplinary proceedings have concluded  
12 even if more than thirty days have passed since the subject RVR was issued, hence the  
13 “exception” to the thirty-day rule. Defendants argue that Plaintiff did not actually  
14 challenge the issuance of the RVR or the resulting disciplinary hearings in inmate appeal  
15 No. SVSP-14-3437, and therefore § 3084.9(g)(1) does not apply and the appeal was  
16 properly dismissed as untimely. (ECF No. 23 at 5.)

17 The Court agrees with Defendants. Plaintiff did not ultimately challenge the  
18 disciplinary action; he challenged the use of excessive force that occurred during the  
19 underlying incident. Although Plaintiff was required under § 3084.9(g)(1) to wait until  
20 disciplinary proceedings were completed to challenge the RVR, there was nothing  
21 prohibiting him from immediately appealing staff misconduct that occurred during the  
22 underlying incident and be in compliance with the time constraints provided by §  
23 3084.8(a). Plaintiff’s assertion in opposition that “his issue automatically became a  
24 disciplinary matter” because he received an RVR, (Opp. at 7), is simply not supported by  
25 the language of §3084.9(g)(1), nor does he cite to any other regulation that supports his  
26 argument.

27 Plaintiff only asserts that he reasonably believed in “good-faith” that he had to wait  
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1 based on his own interpretation of § 3084.9(g)(1). In support, Plaintiff cites to *Nunez v.*  
2 *Duncan*, 591 F.3d 1217, 1226 (9th Cir. 2010), and *Ngo v. Woodford*, 403 F.3d 620 (9th  
3 Cir. 2005). (Opp. at 13.) However, *Ngo v. Woodford*, 403 F.3d 620, was reversed by  
4 *Woodford v. Ngo*, 548 U.S. at 103, and is no longer good law. Secondly, *Nunez* does not  
5 apply because the prisoner in that case filed an untimely appeal as a result of the warden's  
6 mistake, which rendered the prisoner's administrative remedies effectively "unavailable."  
7 591 F.3d at 1226 ) (where prison warden incorrectly implied that inmate needed access to a  
8 nearly unobtainable prison policy in order to bring a timely administrative appeal, "the  
9 Warden's mistake rendered Nunez's administrative remedies effectively unavailable").  
10 Here, Plaintiff does not allege that he relied on a prison official's incorrect explanation of  
11 the regulations; rather, Plaintiff relied on his own interpretation. Plaintiff provides no  
12 relevant legal support for the notion that a prisoner's incorrect understanding of time  
13 constraints which results in his filing an untimely appeal excuses exhaustion.

14 Plaintiff was ultimately found not guilty of the RVR which was then dismissed.  
15 (ECF No. 1 at 35.) Plaintiff argues that he needed to wait for the results of the disciplinary  
16 proceedings because "[w]ithout an exoneration the defendants would have had a defense  
17 for the use of an explosive device," and therefore § 3084.9(g)(1) seemed reasonably  
18 applicable to his case. (ECF No. 1 at 7.) However, Plaintiff was not required to obtain an  
19 exoneration of the RVR before filing an appeal complaining of staff misconduct that  
20 occurred during the underlying incident. Section 3084.9(g)(1) clearly states that appeals  
21 attacking a "disciplinary action" may not be filed before all proceedings thereon have been  
22 completed. It does not state that appeals regarding official conduct that allegedly occurred  
23 during the same events underlying the disciplinary action, as in Plaintiff's case, must also  
24 be stayed. Defendants point to two relevant decisions by our sister court rejecting this  
25 proposition based upon its finding that the disciplinary action and official conduct were  
26 distinct and unrelated matters. (ECF No. 23 at 6.) The Court finds these decisions  
27 persuasive, and agrees that § 3084.9(g)(1)" cannot reasonably be construed to stay the time  
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1 for challenging allegedly contemporaneous official misconduct.” (ECF No. 23 at 6, citing  
2 *Avery v. Moreno*, No. 2:12-cv-3083 KJN P, 2014 U.S. Dist. LEXIS 12422, at \*20-21 (E.D.  
3 Cal. Jan. 31, 2014).) As discussed above, Plaintiff’s reliance on § 3084.9(g)(1), even if in  
4 “good-faith,” does not excuse his untimely filing under the regulations. *See supra* at 8-9.  
5 Plaintiff had the opportunity to file a timely appeal complaining of Defendants’  
6 misconduct within thirty days of the incident, but he failed to do so. Accordingly, inmate  
7 appeal No. SVSP-14-3437, as an untimely filed appeal, does not satisfy the PLRA’s  
8 requirement that Plaintiff must properly exhaust all available administrative remedies  
9 before filing suit in federal court with respect to his claims of excessive force and  
10 deliberate indifference to inmate safety against Defendants Bittner, Hernandez, and  
11 Peffley. *See Woodford v. Ngo*, 548 U.S. at 83-84.

12 Defendants also assert that no mention of Defendant Stevenson or any claim of  
13 conspiracy involving falsified reports against him and Defendants Hernandez and Peffley  
14 are made in appeal No. SVSP-14-3437. (Opp. at 7.) Defendants argue that this appeal  
15 therefore does not exhaust Plaintiff’s conspiracy claim. (ECF No. 23 at 6-7.) Defendants  
16 are correct. Administrative remedies may not be exhausted where the grievance, liberally  
17 construed, does not have the same subject and same request for relief. *See, e.g., Morton v.*  
18 *Hall*, 599 F.3d 942, 946 (9th Cir. 2010) (grievance that complained of visitation  
19 restrictions, and did not mention an assault or theorize that the visitation restriction  
20 imposed was related to the assault, was insufficient to put prison officials on notice that  
21 staff conduct contributed to the assault); *O’Guinn v. Lovelock Correctional Center*, 502  
22 F.3d 1056, 1062-63 (9th Cir. 2007) (even with liberal construction, grievance requesting a  
23 lower bunk due to poor balance resulting from a previous brain injury was not equivalent  
24 to, and therefore did not exhaust administrative remedies for, claims of denial of mental  
25 health treatment in violation of the ADA and Rehabilitation Act). Here, Plaintiff did not  
26 discuss or mention any claim of conspiracy in inmate appeal No. SVSP-14-3437, nor make  
27 any allegation that Defendant Stevenson, or any other Defendant, falsified his report in  
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1 order to cover-up the use of excessive force. Plaintiff has failed in opposition to show that  
 2 there was something in his particular case that made the existing and generally available  
 3 administrative remedies effectively unavailable to him. *Albino*, 747 F.3d at 1172.  
 4 Accordingly, this inmate appeal does not constitute exhaustion of Plaintiff's conspiracy  
 5 claim against any of these Defendants.

6 **2. Inmate Appeal No. SVSP-14-3640**

7 Plaintiff submitted inmate appeal No. SVSP-14-3640 on August 17, 2014. (ECF  
 8 No. 1 at 24.) In this appeal, Plaintiff appealed the cancellation of appeal No. SVSP-14-  
 9 3437, as permitted under the regulations. (*Id.*; ECF No. 23 at 7.) Specifically, Plaintiff  
 10 alleged that § 3084.9(g)(1) applied such that the appeal was not untimely, and that the  
 11 appeals coordinator was acting in a conspiracy to cover up the actions of the staff involved  
 12 in the June 26, 2014 incident. (ECF No. 1 at 27.) Plaintiff did not identify anyone else by  
 13 name, including any of the Defendants, nor make any of the specific allegations raised in  
 14 this action. (*Id.*) He requested that an associate warden review his appeal and that appeal  
 15 No. SVSP-14-3437 be reinstated. (*Id.* at 24, 27.) The appeal was partially granted at the  
 16 second level of review in that an associate warden reviewed the matter, but his request for  
 17 reinstatement was denied on the basis that appeal No. SVSP-14-3437 had been  
 18 appropriately cancelled. (*Id.* at 28-29.) Plaintiff appealed the matter to the third level,  
 19 which initially rejected it because it was missing necessary supporting documents. (*Id.* at  
 20 23.) Plaintiff was afforded an opportunity to resubmit the appeal within thirty days of  
 21 rejection. (*Id.*) Plaintiff resubmitted the matter, but exceeded the time constraint by four  
 22 days; accordingly, the third level canceled the appeal as untimely. (*Id.*)

23 With respect to Plaintiff's allegation that inmate appeal No. SVSP-14-3437 was  
 24 improperly screened-out, administrative remedies may be considered effectively  
 25 unavailable if prison officials improperly screen out an inmate's appeals such that the  
 26 inmate cannot properly complete the grievance process. *Sapp v. Kimbrell*, 623 F.3d 813,  
 27 822-23 (9th Cir. 2010); *see, e.g., id.* at 823-24 (where prison officials declined to reach the  
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merits of a particular grievance “for reasons inconsistent with or unsupported by applicable regulations, administrative remedies were “effectively unavailable”). To satisfy this exception to exhaustion, an inmate must show: “(1) that he actually filed a grievance or grievances that, if pursued through all levels of administrative appeals, would have sufficed to exhaust the claim that he seeks to pursue in federal court, and (2) that prison officials screened his grievance or grievances for reasons inconsistent with or unsupported by applicable regulations.” *Id.* As discussed above, inmate appeal No. SVSP-14-3437 was screened out because Plaintiff had exceeded time constraints under § 3084.8(a). *See supra* at 8. There is no dispute that Plaintiff did in fact file the appeal after the thirty-days period had expired. Furthermore, it cannot be said that the exception to this thirty-day rule under § 3084.9(g)(1) applies when the appeal did not challenge a disciplinary action and that section “cannot reasonably be construed to stay the time for challenging allegedly contemporaneous official misconduct.” *Id.* at 9-10. Accordingly, it cannot be said that Plaintiff has shown the second prong under *Sapp*, i.e., that prison officials screened the appeal for reasons inconsistent with or unsupported by the regulations. Plaintiff is therefore not entitled to *Sapp*’s exception to exhaustion because he has failed to show that appeal No. SVSP-14-3437 was improperly screened out as untimely.

Plaintiff’s subsequent appeal No. SVSP-14-3640, which challenged the cancellation of appeal No. SVSP-14-3437, was also cancelled as untimely because Plaintiff had exceeded the time constraints by four days. *Id.* at 11. Plaintiff challenges this cancellation, asserting that the mailbox rule applies such that this appeal was timely. (ECF No. 1 at 18.) In response, Defendants argue that even if appeal No. SVSP-14-3640 had been decided at the third level, it would not have exhausted Plaintiff’s claims because appeal No. SVSP-14-3437 was properly cancelled and did not address his conspiracy claim. (ECF No. 23 at 8.)

The Court finds that Plaintiff has failed to show that he is entitled to the *Sapp* exception for inmate appeal No. SVSP-14-3640 because he cannot show the first prong,

1 i.e., that if pursued through the levels of administrative appeals, the appeal would have  
 2 sufficed to exhaust the claim that he seeks to pursue in federal court. 623 F.3d at 823-24.  
 3 Appeal No. SVSP-14-3640 would not have satisfied the PLRA's exhaustion requirement  
 4 because it does not have the same subject and same request for relief as the instant action.  
 5 *See, e.g., Morton*, 599 F.3d at 946; *O'Guinn*, 502 F.3d at 1062-63. Inmate appeal No.  
 6 SVSP-14-3640 attacks only the cancellation of Plaintiff's prior appeal based on an abuse  
 7 of discretion by the appeals coordinator, who is not a party to this action. (ECF No. 1 at  
 8 24-25.) Although it alludes to "conspiratorial actions" by the appeals coordinator, it makes  
 9 no specific allegation that any of the Defendants in this action are involved in the  
 10 conspiracy or that the alleged cover-up involved falsified reports. (*Id.*) Plaintiff makes no  
 11 argument in opposition to refute this conclusion. Accordingly, the Court finds that appeal  
 12 No. SVSP-14-3640 does not exhaust any of the claims in this action.

### 13 3. Conclusion

14 In conclusion, the undisputed evidence viewed in the light most favorable to  
 15 Plaintiff shows that he failed to properly exhaust all available administrative remedies  
 16 prior to filing the instant action with respect to his claims against Defendants Bittner,  
 17 Hernandez, Peffley, and Stevenson for excessive force, deliberate indifference to inmate  
 18 safety and conspiracy. *McKinney*, 311 F.3d at 1199; *see Vaden*, 449 F.3d at 1051. Plaintiff  
 19 has failed to show otherwise. Accordingly, Defendants are entitled to summary judgment  
 20 on these claims under Rule 56 based on Plaintiff's failure to exhaust administrative  
 21 remedies. *Albino*, 747 F.3d at 1166.

### 22 C. Motion by Defendant Correa

23 Defendant Correa argues that Plaintiff failed to exhaust his administrative remedies  
 24 with respect to the conspiracy claim against him. (ECF No. 28 at 7.) He also discusses the  
 25 two inmate appeals relied on by the other Defendants, i.e., Nos. SVSP-14-3437 and SVSP-  
 26 14-3640, and argues that Plaintiff failed to file a timely appeal regarding any of the claims  
 27 alleged in the complaint and that the appeals did not address the alleged conspiracy claim  
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1 against him and others. (*Id.* at 8.)

2 The Court has thoroughly discussed the subject matter of the two relevant appeals  
3 in this action in granting the other Defendants' motion for summary judgment. *See supra*  
4 at 7, 11. Neither of those appeals mentions Defendant Correa by name or discusses a  
5 conspiracy claim involving him and other Defendants that involves falsified reports. (ECF  
6 No. 1 at 24, 26, 31, 33). In opposition, Plaintiff asserts that "no specific allegation[s] are  
7 needed during the administrative remedies process," and cites to 42 U.S.C. § 1997. (Opp.  
8 at 9.) First of all, the specific federal statute cited by Plaintiff merely provides  
9 "definitions" for terms used in that particular subchapter, and therefore does not support  
10 Plaintiff's proffered argument. Furthermore, as discussed above, administrative remedies  
11 may not be exhausted where the grievance, liberally construed, does not have the same  
12 subject and same request for relief. *See supra* at 10, 11. A grievance must at least include  
13 sufficient information to alert the prison to a problem and "allow prison officials to take  
14 appropriate responsive measures." *Griffin*, 557 F.3d at 1120. Neither of the appeals  
15 discussed herein alerted the prison that any of the Defendants were conspiring to cover-up  
16 the excessive force by preparing falsified reports. *See supra* at 7, 11. Nor did any of the  
17 appeals specifically allege that Defendant Correa improperly failed to include certain facts  
18 in his report or failed to instruct other officers to include those facts in their reports. *Id.*  
19 Accordingly, it cannot be said that either of these appeals satisfies the PLRA's exhaustion  
20 requirement with respect to the conspiracy claim against Defendant Correa.

21 In conclusion, the undisputed evidence viewed in the light most favorable to  
22 Plaintiff shows that he failed to properly exhaust all available administrative remedies  
23 prior to filing the instant action with respect to his conspiracy claim against Defendant  
24 Correa. *McKinney*, 311 F.3d at 1199; *see Vaden*, 449 F.3d at 1051. Plaintiff has failed to  
25 show otherwise. Accordingly, Defendant Correa is entitled to summary judgment under  
26 Rule 56 based on Plaintiff's failure to exhaust administrative remedies. *Albino*, 747 F.3d  
27 at 1166. The Court need not address Defendant Correa's separate argument that there is no  
28



1 evidence that he conspired with anyone to withhold information from the incident reports.  
2 (ECF No. 28 at 8.)

3 **D. Unserved Defendant SVSP Warden**

4 Defendant SVSP Warden has not been served in this action although it was so  
5 ordered in the Court's Order of Partial Service. (ECF No. 7 at 12.) The only claim against  
6 him is that he acted with deliberate indifference to inmate safety by authorizing the use of  
7 explosive devices. (*Id.* at 5.)

8 Summary judgment may be granted by the court *sua sponte* in favor of a  
9 nonappearing party on the basis of facts presented by other defendants who have appeared.  
10 *See Columbia Steel Fabricators v. Ahlstrom Recovery*, 44 F.3d 800, 802-03 (9th Cir.)  
11 (affirming grant of summary judgment in favor of nonappearing defendant where plaintiff,  
12 in response to summary judgment motion filed by defendant who had appeared, had "full  
13 and fair opportunity to brief and present evidence" on dispositive issue as to claim against  
14 nonappearing defendant), cert. denied, 516 U.S. 864 (1995); *see also Abagninin v. AMVAC*  
15 *Chemical Corp.*, 545 F.3d 733, 742 (9th Cir. 2008) (holding district court properly granted  
16 motion for judgment on the pleadings as to unserved defendants where such defendants  
17 were in a position similar to served defendants against whom claim for relief could not be  
18 stated); *Silverton v. Dep't of Treasury*, 644 F.2d 1341, 1345 (9th Cir. 1981) (holding  
19 district court on its own motion may grant motion to dismiss as to defendants who have not  
20 moved to dismiss where such defendants are in a position similar to that of moving  
21 defendants).

22 Here, Defendant SVSP Warden is in a position similar to served Defendants who  
23 have shown that they are entitled to summary judgment based on Plaintiff's failure to  
24 exhaust administrative remedies. *See supra* at 13-14. Based on a thorough review of the  
25 two inmate appeals at issue, the Court finds that Plaintiff has also failed to exhaust his  
26 claim against Defendant SVSP Warden through these two grievances. As discussed above,  
27 inmate appeal No. SVSP-14-3437 was properly screened out as untimely, and therefore  
28

1 does not constitute proper exhaustion. *See supra* at 10. With respect to inmate appeal No.  
2 SVSP-14-3640, it makes no allegation that Defendant SVSP Warden authorized the use of  
3 explosive devices or was otherwise deliberately indifferent to Plaintiff's safety. (ECF No.  
4 1 at 24, 26.) The only mention of the "warden" is the suggestion that the appeals  
5 coordinator's alleged involvement in a conspiracy "shows the warden's lack of supervision  
6 of his administrators who are engaged in cover ups and blocking access to a full and fair  
7 investigation for the use of force by staff." (*Id.* at 26.) The allegation that the warden is  
8 not properly supervising his staff is not related to the allegation that he was indifferent to  
9 inmate safety because he authorized the use of explosive devices. As discussed above, a  
10 grievance must at least include sufficient information to alert the prison to a problem and  
11 "allow prison officials to take appropriate responsive measures." *See supra* at 14, quoting  
12 *Griffin*, 557 F.3d at 1120. Accordingly, it cannot be said that this appeal satisfies the  
13 PLRA's exhaustion requirement with respect to the deliberate indifference claim against  
14 Defendant SVSP Warden.

15 Based on the foregoing, the Court *sua sponte* grants summary judgment in favor of  
16 Defendant SVSP Warden on the basis of facts presented by other Defendants who have  
17 appeared, showing that Plaintiff failed to administratively exhaust any of the claims in this  
18 action, including the claim against Defendant SVSP Warden. *See Columbia Steel*  
19 *Fabricators*, 44 F.3d at 802-03.

## 20 21 CONCLUSION

22 For the reasons stated above, Defendants Bittner, Hernandez, Peffley, and  
23 Stevenson's motion for summary judgment, (Docket No. 23), and Defendant Correa's  
24 motion for summary judgment, (Docket No. 28), are GRANTED. The claims against them  
25 are DISMISSED with prejudice. Because unserved Defendant SVSP Warden is in a  
26 position similar to the Defendants who have appeared in this action on the issue of  
27 exhaustion, summary judgment is also granted in his favor. The claim against him is  
28

1 DISMISSED with prejudice.

2 This order terminates Docket Nos. 23 and 28.

3 **IT IS SO ORDERED.**

4 **Dated:** July 1, 2016

  
BETH LABSON FREEMAN  
United States District Judge

United States District Court  
Northern District of California

25 Order Granting Def.'s Motion for Summary Judgment  
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